UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF WISCONSIN

Rodney Ryan and Jill Ryan and Fortune & McGillis SC,	)	
	)	Case No. 21-CV-449
	)	Milwaukee, Wisconsin
Defendants-Appellants,	)	
	)	January 13, 2022
vs.	)	1:35 p.m.
	)	
Branko Prpa, MD LLC,	)	
	)	
Plaintiff-Appellee.	)	

TRANSCRIPT OF ORAL ARGUMENTS
BEFORE THE HONORABLE BRETT H. LUDWIG
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For the Plaintiff Rodney Ryan and Jill Ryan and Fortune & McGillis SC: (Via Zoom)	Steinhilber Swanson LLP By: Clair Ann Richman & Colton Chase 122 W Washington Ave - Ste 850 Madison, WI 53703-2732 Ph: 608-630-8990 Fax: 608-630-8991 Crichman@steinhilberswanson.com
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TRANSCRIPT OF PROCEEDINGS

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THE CLERK: Now calling Case No. 21-CV-449, Ryan et al v. Branko Prpa MD LLC. No appearances in the courtroom. All appearances via Zoom. Can we start with appearances for the appellants, please.

MS. RICHMAN: Attorney Claire Ann Resop of Steinhilber Swanson LLP appears on behalf of the Appellants Rodney Ryan and Jill Ryan and Fortune & McGillis SC. Also in the room with me is Attorney Colton Chase also from Steinhilber Swanson LLP.

THE COURT: Thank you. Appearances for the appellee.

MR. POSNANSKI: Good morning. Timothy Posnanski appears on behalf of the Appellee, Branko Prpa MD, LLC.

MS. RICHMAN: If I may correct the record, I said my former name, Claire Ann Resop. I am Claire Ann Richman now. I apologize.

THE COURT: I recall maybe I did that once or twice in a past chat. Good afternoon, counsel. We're here for oral argument in a bankruptcy appeal. As I understand the facts and the procedural background, they are as follows.

The appellant and debtor and defendant, Rodney Ryan, claims he suffered an injury as a result of his employment on or about August 22nd of 2016. He reported that injury and made a

worker's comp claim to his employer. His worker's comp insurer, West Bend Mutual, reported that claim to the State of Wisconsin Department of Workforce Development Worker's Comp Division on September 8th of 2016.

And then on May 9th of 2017, Mr. Ryan through his counsel, Fortune & McGillis, filed a formal claim for worker's compensation benefits against his employer. That claim was disputed, and there were proceedings. But prior to a hearing, the appellant debtor defendant, Mr. Ryan, asserted that his claim amounted to the following; that there was a -- consisted of a claim for $46,067.23 for missed work, $641,863.61 for permanent physical disability and lost earning capacity. And then $1,073,847.30 for unpaid medical expenses and subrogation interest.

Two years later on August 27th of 2019, the debtor, his worker's comp insurer, and his employer agreed to settle the claim through a written settlement or Compromise Agreement. In that agreement, the employer and insurer agreed to make several payments. They agreed to make a $150,000 payment to Mr. Ryan; although, there was an agreement that $30,000 of that money was to be paid directly to his attorneys, Fortune & McGillis. There was also $400,000 that was to be paid to Fortune & McGillis' trust account for disbursement to medical providers and lienholders.

And it was also understood that from any balance

remaining, Mr. Ryan was to receive 80 percent and Fortune & McGillis to receive 20 percent basically after the medical providers and lienholders, any payments to them.

The Compromise Agreement provides it is the full and final comprise, including claims for past and future medical expenses. The respondent was also to fund a Medicare set-aside account.

On September 17th of 2019, Administrative Law Judge Donald J. Duty entered an order approving the Compromise Agreement, and the order incorporated expressly all terms and conditions and limitations in the agreement and ordered that within 21 days, the employer and the insurer were to pay $120,000 to Mr. Ryan, $30,000 to the Attorneys Fortune & McGillis, and $400,000 to the trust account, and the respondent was again to fund a Medicare set-aside account.

Less than a month later on October 11th of 2019, Mr. Ryan and his wife filed a Chapter 7 petition in bankruptcy court. In their bankruptcy schedules, they included a debt to the appellee-plaintiff below, Branko Prpa MD LLC, in the amount of $445,684,000. They also listed several assets from the worker's comp settlement including $110,000 in a BMO Harris account, $320,000 in counsel's trust account that was later amended to the full $400,000 as well as a $271,000 Medicare set-aside.

The debtors also claim $781,000 received from the

settlement as exempt.

On December 16th of 2019, P-r-p-a -- Branko Prpa, filed an objection to the debtor's claim of exceptions and also filed an adversary complaint challenging the treatment of a portion of the settlement proceeds. The adversary plaintiff and exemption of Jack Door (sic) sought a declaratory judgment that the $400,000 in the trust account was not property of the estate and was instead funds -- was instead money that was being held in trust for the benefit of medical providers.

They objected that the clinical exemptions was invalid because the funds were not property of the estate and in the alternative asked that the bankruptcy court impose a constructive trust.

On March 24th of 2021, Bankruptcy Judge Hanan granted Plaintiff's Motion for Summary Judgment concluding that the funds at issue were, in fact, trust funds and not property of the estate. She also held in the alternative that a constructive trust was appropriate, and she sustained the objection to the claim of exemptions on grounds that the funds were not property of the estate.

The debtors filed a notice of appeal on April 8th of last year. The district court clerk's briefing letter went out on May 6th, and the appeal was fully briefed last summer.

On December 7th of last year, the Court set today for oral argument. We later changed the timing and reset it for

video conference due to the latest COVID situation.

So that was a long explication of the background, but those are the facts as I understand them as well as the procedural history. Are there any -- Did I get any of that wrong? Are there any corrections or updates? Are there any other things that the parties want to report before we proceed with argument?

MS. RICHMAN: I have nothing further, Your Honor.

MR. POSNANSKI: I do not either, Your Honor.

THE COURT: All right. So thank you. As I understand the legal issues on appeal are as follows, whether Judge Hanan committed legal error in concluding that the $400,000 in settlement funds was held in trust for the medical providers such that those funds are not property of the estate. Also, whether she committed error in concluding that Wis. Stat. § 102.27(1) did not preclude the funds from being considered trust property. And then finally whether she committed error in alternatively concluding that even if an express trust was not created, a constructive trust should be imposed to take them out of the estate.

So those are the issues that I've identified. I've set aside about an hour for argument today. You guys can use it as you see fit. You don't need to use all of it. Don't feel obligated to, but I'm here really to help you or to listen to what you have to say. I've read the briefs. As you can tell,

I've gone through the procedural and factual background, and I think I have a handle on it, but I will give you now each a chance to state your case. I do have a few questions. I may interrupt from time to time, but I'll let you proceed from there. And appellants, you can go first.

MS. RICHMAN: Thank you, Your Honor. Thank you for the curtesy of the Zoom appearance given the circumstances. I appreciate it.

What is really happening here in this case is setting -- that Dr. Prpa is attempting to set precedent of an ability to collect a discharged debt a different way than would otherwise be possible given the current rulings by the bankruptcy judge.

This debtor filed what is deemed to be a good-faith bankruptcy filing. There -- It is not an asset case at this time. It is not subject to any adversary proceedings regarding discharge or dischargeability by any parties and interest.

The debt to Dr. Prpa is discharged. Dr. Prpa is now arguing that Dr. Prpa should be able to collect the money that was issued under an award by worker's compensation for all medical providers and lienholders and any remaining amount in the account to go to the debtor.

I propose that this debt has been discharged, and these funds are appropriately the property of the estate of the debtor and not to Dr. Prpa. What -- The facts of this make it so clear that it would be inappropriate to award Dr. Prpa --

First of all, there's no lien, and there's never been any allegation of a lien. So despite the fact that it already says lienholders, there are no assertive lienholders or any actual lienholders. Dr. Prpa is merely a medical provider. So how do you take a debtor who clearly earns an income level not sufficient to pay a million dollars of medical bills, who has been in litigation over a worker's compensation claim, and walks away with over $800,000 of medical debt and only a maxim of $400,000 left to pay that medical debt and no additional resource to obtain attorney fees under plaintiff's argument for resolution of what happens with that $400,000?

What they're proposing happens is that the doctor who spends the most money litigating and asking the Court to give them the funds gets the entirety of the funds of which they would only have 40 percent of. What typically happens in a worker's compensation case like this outside bankruptcy is the $400,000 is negotiated by the worker's comp attorney to the medical providers entered into settlement, and any remaining funds are split.

Because the statute allows 20 percent of attorney fees for monies given to the claimants, the award is given in the way that the order and the settlement were worded in this matter, that the remaining is 80 percent of the claim and 20 percent to the attorney. To confirm that, the attorney didn't take attorney fees off the portion that was paid to attorney fees.

There is a lot of argument and a lot of information in the order talking about relitigating this case, the litigation of this case. And the real point of this worker's compensation case is it was not litigated. It was settled. It was settled. There were no facts. There was no evidence. Evidence works differently in worker's compensation administration claims than it works in a civil or a district court or in a state court civil proceeding, but it didn't happen. This was a settlement.

And the settlement was that $400,000 of the award to Ryan Fortune to Ryan went into the trust account of Fortune & McGillis. A trust account is very clear by the supreme court rules that the -- that the lawyer's duty is to the client. And as a bankruptcy practitioner to say that the money held in a trust account for a client is not property of the estate flies in the face of all the case law and all of my experience as a bankruptcy practitioner for what happens with money in a trust account.

If the money were to be held for the benefit of someone else, what happens is there would be an escrow agreement creating a trust, but doesn't exist.

THE COURT: Ms. Richman, I mean I was in private practice for 20 years. There were often times where we negotiate a settlement and as part of the settlement, the payment is made to the defense counsel's trust account. It is supposed to be held there or actually goes to plaintiff

counsel's trust account but doesn't go directly to the plaintiffs until the settlement -- until conditions are satisfied whatever, and that money is held in trust.

It seems to me that's a pretty common thing, and it's not -- There's almost never a formal escrow agreement that gets negotiated in connection with that. One of the lawyers simply agrees to hold the settlement funds in trust pending resolution of whatever conditions there are in the settlement agreement. Isn't that really what happened here?

MS. RICHMAN: No, it's not what happened here because the settlement agreement didn't say that X amount of funds were being held in trust for this medical provider and this medical provider and this medical provider. I liken it more to a personal injury case where a personal injury settlement is based upon a total amount like in this case of missed work, medical bills, and those other damages, and you're given an amount. And we litigate this in exemptions of which part. That was related to the part that we can exempt under certain exemption statutes. That's not happening here. But the entire amount was a worker's comp claim.

And contrary to Judge Hannon's decision and contrary to the argument of Dr. Prpa, the worker's compensation statute awards the claim only to certain parties, including Mr. Ryan and including certain identified parties in our briefs. His wife, his children, his dependents, not his medical providers. This

award was to Mr. Ryan. And it is very common that it is put into this type of a situation in a settlement of what happens with the funds that are held for a medical provider.

Now, if Dr. Prpa were coming in and asking for a pro rata share, that might be something different. In fact, that's what would be the proper thing to do in this case if the funds weren't exempt. So if the funds weren't exempt, they would sit in this account. The debtor has an interest in them, and they would become an asset of the bankruptcy estate for the trustee to distribute, and the trustee would distribute them to all of Mr. Ryan's creditors pro rata. So if this is not an exempt asset, that's what would happen.

So for example in a personal injury case when you get a big lump sum for a personal injury case and you can exempt a certain amount of an award for damages for personal injury, different under state, different under federal, add your wild card in, the debtor gets to keep the amount of that award that's exempt, and the rest of the funds get distributed by the trustee to the debtor's creditors. That's an appropriate system with a government statute enforced right to exemption for debtors to have fresh starts given the circumstances of why they have the money. It is an appropriate circumstance for a trustee to be paying pro rata to all of the debtor's creditors when there's a million dollars of debt and only $400,000 of an asset. But if some of that asset is exempt, then that asset is found to be

allowed to be kept by the debtor despite the fact that these creditors exist because of that, and they get to keep that amount.

The statute for personal injury doesn't say you get to keep a wrongful death or a damage's claim or a wild card claim unless you got that money because you incurred medical debt. Well, that always happens.

The right thing to happen is that this is property of the estate. It was in the attorney's trust account for the benefit of the client. It was awarded to the client and to nobody else under the worker's compensation statute, and it is property of the estate.

And then what's property of the estate? Does it fit one of the exemptions? And if it does, the debtor gets it. And if it doesn't, then it's an asset to be distributed by the trustee, not for a medical provider to come say you law firm have a duty to me as a medical provider. Okay, the lawyer of a law firm also has a duty to the client to pay any remaining 80 percent of that client.

If this is really what the answer is, how does any law firm honor their duty to pay every medical provider in full? And then was that medical provider really a result of that injury? Clearly, this was a contested worker's compensation claim or they wouldn't have settled after years of litigation for less than being awarded or getting the award. So now --

THE COURT: Let me stop you there. So what would happen if there had been no settlement? Sort of two different scenarios here. The first one would be what would happen if there was no settlement and the Ryans declared bankruptcy as they did? Their worker's comp claim would have been an asset of the estate, correct?

MS. RICHMAN: Yes.

THE COURT: And presumably, there could have been an effort by the Chapter 7 trustee to liquidate that asset and could have litigated that I suppose either probably outside the bankruptcy court. But if that had happened and then after the bankruptcy was filed there had been a settlement, how would those funds and basically this exact same settlement was reached. It seems to me that the worker's comp claim by definition includes, you know, it includes funds to cover the injury and then also medical expenses.

If this had happened during the bankruptcy, wouldn't the doctors have been entitled to say if this dispute had been litigated post filing, post petition, wouldn't the doctors have been able to come in and say, look, we're entitled to get paid as part of this resolution?

MS. RICHMAN: No different than in a personal injury action. They do out of the assets of the case for nonexempt assets. So the question is how much of that claim is subject to the exemption that was claimed in this case? I assert the

exemption should have applied. This is no different than a personal injury action that exists. And regardless of the medical bills, the debtor gets to keep the exempt portion. It can be a bad mesh case. It can be an employment claim. But whatever the debtor can exempt out of those claims and my opinion, it could be either or depending upon what the trustee decided is that in this case, the trustee would have decided that, well, that's an exempt claim because it's a worker's comp claim, and that is exempt under the statute and therefore it has no value and it would have been abandoned back to the debtor. But the debts of the medical providers are still discharged.

The only time the medical providers end up getting paid is either when they have a claim that's paid through the bankruptcy estate or they have a lien on the proceeds. There is no lien on the proceeds. Sometimes there are liens on proceeds in personal injury actions. That's not true in this case. There is no lien.

THE COURT: So my next question though is so when this was settled, the -- In determining the amount that the insurance company, the worker's comp carrier is going to pay as part of that settlement, they are looking at the medical expenses. So the amount that they agree to pay out is based on an idea that if they don't settle and they go all the way through trial, they're going to have to pay those medical expenses.

Given that, didn't the -- didn't the carrier here and

the employer in agreeing to the amount that was paid, weren't they assuming that portions of that money were going to pay off those medical expenses?

MS. RICHMAN: Maybe, but they could have agreed to order it. They could have ordered exactly who it was paid to. It wasn't ordered that way. It was paid to the claimant, and medical providers are not claimants. They are not parties contrary to what was in the opinion and the brief, it is not in the statute. They are not claimants under the worker's compensation code. They aren't --

(Reporter note: Audio at 23:13 - 23:58 is missing.)

MS. RICHMAN: We know what the settlement says about the medical bills, but they have no liability. The carrier has no liability to any of the medical providers, zero. This is a settlement with the employee only based on --

THE COURT: If this case had gone to trial, they would have had liability to Mr. Ryan based on his liabilities to those medical providers because they have to pay his actual medical expenses plus. So in determining to pay on the claim, they are looking at those actual bills and including that in their calculation of the loss; isn't that right?

MS. RICHMAN: Yes. No different than in a personal injury action in valuing the money from a personal injury action. Just like the medical providers have no claim against the insurance company for those items, they have no claim

against the insurance company here, and those debts were discharged. And our statutes say that you can discharge those debts and our statutes say that certain amount of those recoveries are exempt. This recovery would have been exempt, but that's not the issue here. It is property of the estate. I think it would have been exempt. They argued it wasn't exempt only on the basis of it being property of the estate. I believe once it is property of the estate, the exemption clearly applies, and they are out of luck. That's bankruptcy. There's no crying in bankruptcy. The debt is discharged, and that amount is exempt no different than a personal injury or a wrongful death claim that's based upon those kinds of compensatory damages.

THE COURT: So maybe you don't know this. The timing here, the debtors settled this with their worker's comp lawyer and then filed for bankruptcy less than a month later. Was the bankruptcy in contemplation at the time they reached the settlement with the carrier and the employer including this language about these funds going to the medical providers?

MS. RICHMAN: Well, number one, Your Honor, I wasn't involved, and I have absolutely no idea. Number two, I think it is absolutely irrelevant because that analysis would only be relevant as to whether or not this is a bad-faith filing. I mean, that's a discharge and a dismissal question, not an exemption in a property of the estate question.

THE COURT: I disagree. We're talking about here interpreting this agreement and what was intended and also the order, and ultimately the order incorporates the agreement. So what was intended at the time the debtors in entering into this agreement agreed that these funds would go to these medical providers subject to this remainder interest, we can get to later, but that was part of the deal they cut, so their intentions at the time I think are relevant.

MS. RICHMAN: There is no evidence about their intentions. There are allegations, in my opinion, improper allegations about their intentions in the appeal brief filed by respondent. There is no evidence that any of it was improper. But as I sit here today and if we want to make assumptions, what do you think is going to happen to a low income wage earner who is liable for over a million dollars who only has $400,000 to pay his medical providers? I know what happens. The lawyers start calling the medical providers and say will you take a certain percentage discount? And guess what? Certain of those medical providers, particularly the ones who litigate, no, we want the whole thing, we're not taking less. That's what happened, and that's why we're here.

But how can it be bad faith or wrongful intention when you have a settlement and you have over $400,000 of medical debt you can't pay to file bankruptcy? But I don't know, and there's no evidence in the record of any of that just like there's no

evidence in the record about the good faith of the litigant here to accept a pro rata percentage of that award.

THE COURT: Do you agree that Judge Hanan identified the elements to establish an express trust are existence of a trustee, the existence of a beneficiary, and then trust property being held for -- by the trustee for that beneficiary? Are we in agreement that those are the appropriate elements?

MS. RICHMAN: Yes.

THE COURT: And -- Okay. Can you give me a little bit more on the debtor's agreement? How is Wis. Stat. § 102.27(1) relevant?

MS. RICHMAN: 102.27(1) is relevant because it says that this award cannot be taken away from them to apply their debts, and the award included the $400,000. That's the exemption. That's the creditors can't come in and grab it. It wasn't directed to be specifically paid.

I mean, maybe shame on Dr. Prpa. He didn't go in and have a specific payment. I don't know. I wasn't involved, and it was a settlement, not a litigated case. But that says nobody can take that money, including somebody with a medical claim. And there's a lot of identification with 102.26(b)(3) (sic) about how funds can be directed. Yes they can, but the claimant may request. The claimants didn't request any of that in this case. That isn't applicable.

Dr. Prpa doesn't getting to go in and request that

that claim be directed to him, and Dr. Prpa isn't allowed to take those claims and that fund under that exemption in 102.27(1).

THE COURT: Didn't Mr. Ryan in essence request that these funds be directed to the medical providers generically, not to anybody specific, when he asked the ALJ to approve the settlement agreement which provides for these payments for that portion of the funds to go to the medical providers?

MS. RICHMAN: I don't know exactly who asked that and how that was negotiated, and I didn't think that that was relevant what was asked. The order is $400,000 of a claim to Mr. Ryan to be put into the trust account of Fortune & McGillis. A settlement? Who asked. It was certainly negotiated. Who gave in to who what? I don't think it is relevant.

THE COURT: But by agreeing to that allocation and agreeing to that payment to be made and then asking the judge to -- the ALJ to say, we want you to approve this and bless it and say this is the payment that should be made as of the debtor, hasn't Mr. Ryan asked for that?

MS. RICHMAN: Mr. Ryan has asked for that in his claim. He hasn't asked for that to be the benefit of Dr. Prpa. He hasn't asked to waive his exemption and rights to those funds.

THE COURT: One last question for you. With respect to the alternate ruling on the creation of a constructive trust.

I'm curious as to what the standard of review for me is on that because it seems to me that the imposition of a constructive trust is equitable. It's discretionary. So am I reviewing that for abuse of discretion? What's the standard of review from the appellant's perspective?

MS. RICHMAN: I understood the standard of review to be an error of law, and I believe that an error of law was made. This was a summary judgment. This was not after an evidentiary hearing, so it was made as a matter of law not based upon a findings of fact. There are also many statements in that decision about what would be evidence and what would not be evidence, which I find very flawed because they aren't in accordance with what is evidence in a worker's compensation hearing.

For example, there's a situation where Judge Hanan says, well, the medical records can't be evidence put in by Dr. Fortune (sic). Well, in worker's compensation they can be. In worker's comp as long as they are certified by the medical professional they are admissible, and they were. Those would have been admissible in the worker's comp.

There was not a finding based upon appropriate fact finding or even an evidentiary hearing. It was summary judgment and therefore I believe that she's wrong as a matter of law, that there's no evidence that a constructive trust was created because there is no evidence of wrongdoing. And frankly if

there was, we're in the wrong -- we're in the wrong claim. If that's true that there was, this really would be a discharge or dischargeability case, and it's not.

THE COURT: As I understood her ruling on the evidentiary issues, it was that at summary judgment, a party opposing summary judgment or party actually moving for summary judgment has an obligation to present evidence that would be admissible to the Court. And the fact that -- The fact that an ALJ could take into account other evidence, that's one thing, but you still have to present it to the federal court to the bankruptcy court in a way that is admissible, and that it just wasn't done properly here, just kind of thrown in without proper authentication. But anyway, we don't need to get bogged down in that.

MS. RICHMAN: I want to say that I think the issue for that though was her basis about you're trying to relitigate the case. You're having this evidence. No, that's the point. This case was never litigated. There were no findings of fact. There were no evidence. I think Judge Hanan was wrong as a matter of law to have reviewed it that way with regard to a settlement agreement that had no evidence and had no litigation. As a matter of law that was improper and wrong and not relevant to the matter at hand of whether or not a trust was created.

THE COURT: All right. I think that's all I had for you. If you have anything else, you can continue; otherwise, I

will turn to Mr. Posnanski.

MS. RICHMAN: I just wanted to point out that if appellant is correct -- Sorry, if we are not correct and if Dr. Prpa can come in and get a court order and demand the entire $400,000, how does that make sense and how does that square with the fact that this is a fiduciary obligation by a law firm to every medical provider that exists as to the Ryans?

To me, that result shows us why this is the wrong result, is that Fortune & McGillis cannot have a fiduciary obligation to pay the entire amount to every medical provider that exists with regard to the Ryans and to negotiate that. That was never the intent. That's not how worker's comp works. That's why the claim goes to Mr. Ryan, and he's provided an exemption for it, and he should be allowed to have his exemption, whatever is allowed by law, in his worker's comp claim, which includes the $400,000 for medical expenses.

THE COURT: One follow up on that. As I understand Judge Hanan's ruling, this is not a ruling that Mr. Prpa or the LLC, the plaintiff, necessarily gets this entire amount of money. It is a ruling that this money is not property of the estate, presumably the plaintiff, and any other medical providers that are out there share an interest in the trust funds if there was a trust, and that would be something for -- not for the bankruptcy court because it's not property of the estate but something for a state court to address. Perhaps

counsel files an interpleader or something like that to determine whose entitled to what portion. But I don't see anything in Judge Hannon's order -- either of her orders or judgments that either the judgment on the adversary or ruling on the claim of exemptions that rules that this entire set of funds goes to the -- goes to the plaintiff in this case. Am I wrong on that?

MS. RICHMAN: No, Your Honor. There is a state court action pending where Dr. Prpa has filed a complaint and is asking for the entirety of the account based upon Judge Hanan's decision. And in these appeal briefs by Dr. Prpa, they have asserted that it is a violation of fiduciary duty to not ask the bankruptcy court for a stay against them giving them the whole $400,000, so that was brought into the briefs in that matter by Dr. Prpa.

THE COURT: Thank you. Mr. Posnanski.

MR. POSNANSKI: Thank you, Your Honor. I have my own thoughts on I guess on how I want to proceed with argument. I've heard a lot of things here, and I think some of them I think the Court has already properly addressed.

There were some comments at the outset, and I think throughout the appellant's presentation essentially taking issue with the motives of Dr. Prpa or somehow impugning my client's integrity by proceeding in the manner that we have.

You know, this is not an effort to collect a

discharged debt. As the Court noted at the outset, the adversary complaint was filed before any of Mr. Ryan's debts were discharged. We brought the adversary complaint early on in the proceedings, and so I just can't let that pass without comment.

At the outset, Your Honor, I would note a few things. First, I think Judge Hanan's decision and analysis was thorough and well reasoned. She had even asked for and received and considered supplemental briefing from the parties. This was not a rash decision. She had allowed the parties to engage in oral argument as well and even then asked for supplemental briefing after the oral arguments. She clearly took her time and considered these issues conscientiously.

Second, it dawned on me actually preparing for today's proceedings and sometimes as lawyers, we get so into the weeds in our own arguments in the case that somehow you overlook some things. I think the parties have overlooked something that I think is critical and dispositive here.

The defendants have predicated their arguments -- I'm sorry, the appellants have predicated their arguments and defendants below upon 102.27(1) and the protection that it affords. But I don't see how that is at all applicable here. That section provides that no compensation awarded or paid shall be taken for the debts of the party entitled thereto.

I think we've overlooked the simple phrase "be taken".

There has never been a taking. Here, you know, a trust would not have the effect of a taking. The claimant specifically agreed to set these funds aside for disbursement to medical providers and lienholders. You noted that, Your Honor, in your questioning of opposing counsel when you asked Ms. Richman, well, didn't Mr. Ryan, the debtor here, agree to this? And if you look at the Compromise Agreement, he did exactly that.

Mr. Ryan signed the Compromise Agreement. He signed the order asking that the Court then approve the Compromise Agreement instructing that $400,000 be specifically set aside for disbursement to medical providers and lienholders.

You know, I think we have to note the interplay, and I think Judge Hanan correct did with 102.26(3)(b)(2), which says, At the request of claimant, medical fees may be awarded out of the payment awarded." That's precisely what occurred here. Ryan, the claimant, signed the Compromise Agreement and agreed that the order should be entered ordering that $400,000 be paid out for disbursement to medical providers.

There's a notion in some of the briefing that the payment must be directed specifically to the medical providers or set out in a specific amount, but that's not set forth anywhere in the statute, and there's no authority that's been provided that in order for those payments to be set aside at the request of claimant that that must be done.

With respect to the taken aspect of it. Dr. Prpa is

not a general creditor. He is a medical provider. That's specifically identified and contemplated by the statutory scheme in 102.26. There's no charging order here we're seeking to enforce. There's no garnishment under which we're trying to get at these proceeds. We haven't seized the funds in an attempt to collect a debt. They were specifically carved out in the order and the Compromise Agreement.

You know, I note that according to appellants, I think we are somehow to derive the intent of the parties by looking outside of the plain language that they saw fit to use in the Compromise Agreement and the order.

Throughout the entirety of the proceedings, I think the defendants have, frankly, been all over the map. I don't necessarily fault Ms. Richman for that because she was not counsel before the bankruptcy court as we were litigating these issues. But, you know, they took contrary positions before the Court on the summary judgment motion both in their briefing, during oral argument, and then in their supplemental materials.

And you know I think if I was in the position, I would certainly hope that the Court would overlook the arguments that they actually made to the bankruptcy court too.

Despite originally agreeing, the Compromise Agreement and order were plain and unambiguous. The defendants reversed course. They attempted to introduce extrinsic evidence regarding the parties' intent, and they failed to do so in an

admissible form. That's what the materials that Judge Hanan addressed in her decision were meant to do. There wasn't somehow to -- I guess I don't know. The purpose of her addressing those materials and the reason they were submitted by the appellants was to try and demonstrate what the parties intent actually was because they contended it was different than what was set forth in the plain language of the Compromise Agreement and the order.

They then even suggested that the court should correspond with the administrative law judge to understand the meaning of the order that he had entered. And then amazingly -- I really do think this was amazing when it occurred. I can't really get over it as this case has gone on. They argued that the bankruptcy court should disregard the plain language of the Compromise Agreement and order because it was just a wink, wink agreement, and the defendants should do what they want with the money and hopefully you negotiate was the direct quote from counsel for Mr. Ryan before the bankruptcy court.

He continued in his argument saying, and this is a direct quote. It's in our appendix at page 326. "No one in this agreement ever really intended to set any of this money actually aside for the medical providers. The medical providers only had rights to the extent Mr. Ryan wanted to pay at his leisure." That's the position they have taken.

The funds were -- Mr. Fortune then noted in his

briefing that the funds were placed into the FMC Trust Account by coincidence.

Now, they have reversed course again on appeal and argued that the plain language doesn't establish a trust. The one thing that has remained consistent is their insistence that Mr. Ryan somehow has unfettered control of funds and can do what he wants with them even though they sit in his attorney's trust account. Mr. Ryan certainly has no authority to act on behalf of the firm with respect to funds in the firm's trust account. He can do with these funds as he saw fit.

THE COURT: Mr. Posnanski, let me pose to you the question that I posed to -- one of the questions I posed to Ms. Richman, which is let's assume that the debtors had filed for bankruptcy before the settlement, before there was any sort of agreement. They made the claim and filed their Chapter 7 petition before reaching a settlement. How would the -- And then how would it have played out differently and what would be the result with respect to your client?

MR. POSNANSKI: If they used the exact same language in the Compromise Agreement and order that they used here, the result should be the same as determined by Judge Hanan. If it was determined that a lump sum should be paid to Mr. Ryan in resolution of his worker's compensation claim, it should be paid entirely to Mr. Ryan and would be the appropriate subject of an exemption. That's the entire issue from our perspective, Your

Honor.

Had they used language which was suggested by Mr. Fortune but not supported by the record that this was actually a lump sum payment of $550,000, we wouldn't be here. I would have no argument. And so if in the context of those negotiations to follow along Your Honor's questioning of Ms. Richman, if the employer and the insurer agreed to pay the total of $550,000 and separately carved out $400,000 for disbursement to medical providers, it was their expectation that the $400,000 would be used to pay those medical providers, and so I don't see any difference in how this would play out if they had filed bankruptcy before this case had been settled in the way that it was.

And you know if -- We did submit actually, it didn't appear to be necessary for the court to reach its decision, but you had asked what the expectation and the assumption was of the insurance company in comprising the claim with Mr. Ryan. We submitted a sworn declaration by Ms. Joyce Seib from West Bend Mutual Insurance that says exactly that, that it was their expectation and assumption that the $400,000 that they had set aside would be used to pay medical providers. So that is or was in the record. Judge Hanan did not determine that that was a reason or a fact that she needed to rely upon, but there is actually evidence of that to address the Court's question.

THE COURT: In some ways that's parol and we go with

the language that was agreed to not what somebody says they intended. The best evidence of their intent is what was actually --

MR. POSNANSKI: I would agree, Your Honor. Frankly, any consideration of the declaration would be inappropriate given the position that the agreement is clear and unambiguous. From our perspective, there would be no other purpose for including that language in the first instance.

And you know, the notion that these funds were always Mr. Ryans and he had discretion to negotiate, satisfy, or discharge them in any way that he saw fit, if everyone understood that these funds belonged to Mr. Ryan and were shielded in their entirety by 102.27, it raises some questions. First, why separately carve out and I indicate that they are for disbursement to medical providers. Why pay them to the trust account of Fortune & McGillis instead of Mr. Ryan directly? Why did the parties use that language then? What purpose did it serve?

The appellant's arguments rendered this language meaningless surplusage in the way that it's is included. It frankly makes no sense to include it if the parties really intended all along that these funds belonged to Ryan and if he chose to negotiate he could. If he didn't, he didn't have to. He could discharge them if he wanted to. It is dispelled by the language they actually used, and there's been no explanation or

reasonable alternative interpretation that has been offered to explain why that language is in the agreement in the way that it is.

THE COURT: Let me just pause. So let's assume that they filed for bankruptcy before there was any sort of resolution. So his worker's comp claim at that point is an asset of the estate, correct?

MR. POSNANSKI: Right.

THE COURT: There's no resolution. He goes through, gets his Chapter 7 discharge. Your client's claim would be discharged?

MR. POSNANSKI: My client's claim would be discharged, yes.

THE COURT: And then he could have settled -- Well, he has his worker's comp claim, whatever exemption he applied to it. Assuming that the trustee pursues it or they abandoned it. You can weigh in on which one of those things that could actually happen, it is speculation. If they had filed their petition before liquidating this claim, it's property of the estate. Your client would be out of luck if they got through discharge. And then any settlement that he got on that claim if it was -- if the estate abandoned it, would be his, right?

MR. POSNANSKI: It depends, Your Honor.

THE COURT: So why is the result different the fact that he settled before the petition?

MR. POSNANSKI: Because the result would not be any different, Your Honor, if they used the same language in that hypothetical resolution agreement as they used here.

THE COURT: So my question or what I'm thinking is that if they had filed for Chapter 7, let's say the trustee abandons this asset back to the debtors, they get their discharge, your client's out of luck, the client has this worker's comp claim against the carrier. The carrier is probably not going to pay him a ton of money for medical expenses because the medical expenses have been discharged.

MR. POSNANSKI: That may very well be true. I think that almost gets to the point, you know, my client was chastised for what we were allegedly trying to do here. Here's the consequence if Mr. Ryan is correct. The $400,000 that was set aside for payment to medical providers is entirely his. He gets a win fall. He doesn't have to pay any of the medical providers. All their clients have been discharged. So under the circumstances, I agree with you.

Hypothetically if that claim goes to as it's prosecuted and maybe they reach a resolution, I would agree that the employer and the insurance company are likely to significantly reduce any amount of compensation that they would provide to Mr. Ryan for medical expenses knowing that those claims had been discharged. There would be no purpose, no reason to set aside $400,000 for those payments I guess other

than maybe they knew those payments still existed and thought those providers should be paid. I mean under the circumstances, there would be no reason to do so.

And so the distinction here is that those claims were still very much alive and out there, and they knew that Mr. Ryan was responsible for them, and they specifically carved out the 400,000 for disbursement to medical providers.

I think it's hard to say what would happen had they filed bankruptcy first. I think the likely reality too is that any worker's compensation practitioner in this area will not agree to set things aside. They are going to proceed with a lump sum agreement I think under most circumstances going forward because again if the payment had been made in a lump sum directly to Ryan, my client would have no legitimate argument here, but that's not what happened.

THE COURT: All right.

MR. POSNANSKI: And I think the bankruptcy court properly found that the language used in the Compromise Agreement order established an express trust for medical providers and lienholders. The court already identified the three elements. I don't think there's any dispute as to what the elements of express trust are, and I think all three elements are clearly present here, and the bankruptcy court agreed and even found that they were clearly present here.

The order placed Mr. Fortune and his firm in the role

of a trustee. I don't see anything problematic about that. I don't agree there is somehow some conflict with their responsibility there. The fact that they didn't then properly fulfill their duties as trustee does not mean they could not do so.

The bankruptcy court properly noted the fact that there was absolutely no evidence that Fortune & McGillis or Mr. Fortune ever attempted to negotiate with the medical providers after receipt of the $400,000.

The court noted and I would say noted even with emphasis added in its decision that the requirements of Supreme Court Rule 21.15(d)(1), which provides that, "Upon receiving funds or other property in which a client has an interest or in which the lawyer has received notice that a third party has an interest identified by a lien, court order, judgment or contract, the lawyer shall promptly notify the client or third party in writing." That did not happen.

And the Court emphasized the language about the lawyer's duties upon knowledge or receiving notice that a third party has an interest in the funds that have been deposited in the trust account. It is not correct to say that all funds deposited in a law firm's trust account belong only to clients. Routinely, third parties have rights on those funds and here that is exactly what happened.

There is no adversity with respect to the law firm's

interest in Mr. Ryan's contingent remainder interest in the funds. That interest only would arise in the unlikely event that there were funds remaining after disbursement to medical providers. The disbursement had to come first.

Indeed, the order specifically addressed how the remaining funds would then be handled to avoid any conflict between Mr. Fortune and his client's remainder interest after that disbursement had, in fact, occurred.

Mr. Fortune had to administer the funds to set aside -- that were set aside for disbursement to the medical providers with the medical providers. That was his obligation. He was supposed to administer them, manage the funds and figure out how they should be disbursed.

Certainly, he was well within his rights to set up a claims procedure, contact the medical providers. He knew who they were. It was part of the medical claim -- worker's comp claim that he had submitted, so it's not like they were a mystery. He could have identified them said these funds had been set aside, asked them to make a claim and indicated there would be a bar date so that if they didn't make at that claim timely, they would not be interested or they could have proposed a pro rata distribution from the beginning, but they didn't do so.

The Wis. Stat. § 701.0803 requires trustee to act impartially in investing, managing and distributing the trust

properly. But here, Mr. Fortune opted not to act with respect to the $400,000.

The argument that Mr. Ryan could somehow do as he saw fit with the funds contradicts the plain language of the Compromise Agreement and the order. The $400,000 is identified and made payable to the trust account for disbursement, and that language is important for disbursement. It's not for settlement for negotiation. It is to be disbursed to medical providers and lienholders. There is no discretion left with respect to Mr. Ryan and not even Mr. Fortune, which is what was supposed to happen here. The language could not be more clear.

THE COURT: Let me add one thing on the contingent remainder piece. So let's assume that these funds are segregated. They are in trust for payment to medical providers. And if there's any remainder, obviously, to pay the lawyers and Mr. Ryan their shares. So what happens now if there is a really good negotiations and $300,000 is enough to satisfy all the medical providers, they were willing to comprise, and there's $100,000 left. What happens to that now? Would that not be property of the estate? Does the Chapter 7 trustee now have the ability to come after it even post discharge? How does that work?

MR. POSNANSKI: So if there is the remainder that's left over, I think that would be property of the estate. And I think, you know, first and foremost, which is not really in

controversy if that happened outside of the confines of bankruptcy, that $100,000 would be split as set forth in the Compromise Agreement and order, the 80 percent, 20 percent. If it happened --

THE COURT: Although isn't the -- Here's a question. So isn't the lawyer's share of that, has that been discharged?

MR. POSNANSKI: That's a good question, Your Honor. That's not one I've really given thought to. I think working through how that process would work, you know, that 20 percent that's still to be paid to the lawyer, I think would fall within the same analysis under 103 --

(Reporter note: No further audio found on this recording. Tape concluded at 59:27.)

C E R T I F I C A T E

I, SUSAN ARMBRUSTER, RMR, Official Court Reporter and Transcriptionist for the United States District Court for the Eastern District of Wisconsin, do hereby certify that the foregoing pages are a true and accurate transcription of the audio file provided in the aforementioned matter to the best of my skill and ability.

Signed and Certified May 3, 2022.

/s/Susan Armbruster

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